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SECTION OF LITIGATION
American Bar Association

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To: Members of the Bench, Bar and Academia

From: Gregory P. Joseph and Barry F. McNeil
Co-Chairs, Task Force on Electronic Discovery
ABA Section of Litigation

Re: **Electronic Discovery Standards — Draft Amendments to ABA Civil Discovery Standards**

Date: November 17, 2003

In August of 1999, the American Bar Association House of Delegates adopted Civil Discovery Standards to address practical aspects of the discovery process that are not covered by state or federal rules of procedure. Two of the Standards (Nos. 29 and 30) addressed Electronic Discovery.

In the four years since the adoption of the Civil Discovery Standards, the issues surrounding Electronic Discovery have exploded. In light of these developments, Patricia Lee Refo, the Chair of the Section of Litigation, appointed a Task Force to reexamine the Standards insofar as they pertain to Electronic Discovery. The members of the Task Force include lawyers from large firms and small, plaintiffs' and defense counsel, inhouse and outside lawyers, a state Supreme Court justice, and technical experts.

Enclosed is a copy of the public-comment draft of the Task Force's proposed amendments to the Civil Discovery Standards. We are soliciting comments from distinguished judges, lawyers and academics from around the country. A summary of the amendments follows:

Existing Standard 29 — Preserving and Producing Electronic Information. Existing Standard 29 has been modified in three ways. First, it has been stripped of language suggesting that it was taking a position as to substantive legal doctrines (the Standards were not intended to replace existing rules or statutes but rather to complement them). Second, a checklist of sources of electronic data and discovery has been added as an aid to practitioners and judges. Third, the factors for the court to consider in determining whether to order production, or to allocate costs, has been expanded.

Existing Standard 30 — Using Technology to Facilitate Discovery. Existing Standard 30 has been modified in two ways — first, to clarify that subdivision (a) applies to production in electronic form of discovery materials not stored electronically, and, second, to convert what was previously an option into a presumption that written discovery requests or responses should be provided to opponents unless the parties have agreed otherwise.

New Standard 31 — Effective Use of Discovery Conferences. Draft Standard 31 focuses on effective use of discovery conferences to deal with electronic discovery issues. Draft Standard 31(a) specifies several categories of electronic discovery related matters that the parties should confer about at an initial discovery conference. Draft Standard 31(b) identifies additional issues for the parties to discuss at "meet-and-confer" conferences when they are focusing on specific discovery demands and objections.

New Standard 32 — Attorney-Client Privilege and Attorney Work Product. Draft Civil Discovery Standard 32 deals with privilege and work product concerns. It applies in the common situation in which electronic data must be extracted for production by an IT expert not employed by the producing party. It suggests three alternate routes to ameliorate waiver concerns, and recommends procedures to implement them.

New Standard 33 — Technological Advances. Draft Standard 33 recognizes that there are emerging new technologies that may not be electronically based. It provides that, to the extent that information is stored other than electronically (or in hard copy), it is intended that Standards 29-32 may be consulted with respect to discovery of such information, with appropriate modifications for differences in storage media.

The Task Force welcomes public comment on these proposed amendments to the ABA Civil Discovery Standards. It is the goal of the Section of Litigation to bring them to the House of Delegates, in final form, for approval in August 2004. Your observations are welcome.

Please forward any comments to either of the Co-Chairs or to any member of the Task Force (please feel free to use email).

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CIVIL DISCOVERY STANDARDS*

AUGUST 1999

[NOVEMBER 2003 DRAFT AMENDMENTS TO ELECTRONIC DISCOVERY STANDARDS]

*The Standards, which appear in bold face type, were adopted as ABA policy in August 1999.

IV. DOCUMENT PRODUCTION

10. The Preservation of Documents. When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so.

[This Standard is unchanged but is referenced in Standard 29(a)(i), *infra*.]

VIII. TECHNOLOGY

29. Preserving and Producing Electronic Information.

a. Duty to Preserve Electronic Information.

i. A party's duty to ~~take reasonable steps to~~ preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format~~, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail~~.

ii. Electronic data as to which a duty to preserve may exist — and the platforms on which, and places where, such data may be found — include:

a. Databases;

b. Networks;

c. Computer systems, including legacy systems;

d. Servers;

e. Archives;

f. Back up or disaster recovery systems;

g. Tapes, discs, drives, cartridges and other storage media;

h. Laptops;

i. Personal computers;

j. Internet data; and

k. Personal digital assistants.

[Former Standard 29(a)(ii) has been renumbered 29(b)(i)]

iii. Electronic data as to which a duty to preserve may exist include data that have been deleted but can be restored.

~~iii. Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been~~

~~deleted or discarded in the regular course of business but may not have been completely erased from computer memory.~~

b. **Discovery of Electronic Information.**

i. ~~Unless otherwise stated in a request~~ Document requests should clearly state whether electronic data is sought. In the absence of such clarity, a request for "documents" should ordinarily be construed as also asking for information contained or stored in an electronic medium or format~~.~~, unless otherwise stated in a request. [Formerly, Standard 29(a)(ii)]

~~i~~ii. A party ~~may ask~~ should consider asking for the production of electronic information in hard copy, in electronic form or in both forms. A party ~~may~~ should also consider asking for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate *(a)* whether and when electronic mail was sent or opened by its recipient(s) or *(b)* whether and when information was created and/or edited. A party should also ~~may~~ consider requesting the software necessary to retrieve, read or interpret electronic information. A party who produces information in electronic form ordinarily need not also produce hard copy to the extent that the information in both forms is identical.

~~ii~~iii. In resolving a motion seeking to compel or protect against the production of electronic information or related software, or to allocate the costs of such discovery, the court should consider such factors as *(a)* the burden and expense of the discovery, considering among other factors the total cost of production compared to the amount in controversy; *(b)* the need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; *(c)* the complexity of the case and the importance of the issues; *(d)* the need to protect the attorney-client privilege or attorney work product ~~privilege~~; *(e)* the need to protect trade secrets, proprietary, or confidential information; *(f)* whether the information or the software needed to access it is proprietary or constitutes confidential business information; *~~(f)~~(g)* the breadth of the discovery request; ~~and *(g)*~~*(h)* whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; *(i)* whether the requesting party has offered to pay some or all of the discovery expenses; (j) the relative ability of each party to control costs and its incentive to do so; and *(k)* the resources of each party as compared to the total cost of production, *(l)* whether responding to the request would impose the burden

or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information, *(n)* whether the responding party stores electronic information in a way that makes it more costly or burdensome to access the information than is reasonably warranted by legitimate personal, business, or other non-litigation related reasons, *(o)* whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable. In complex cases and/or ~~ones~~ cases involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues.

~~iii. The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.~~

~~iv.~~ Where the parties are unable to agree on who bears the costs ~~of producing electronic information, the court's resolution should consider, among other factors:~~

~~*(a)* whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;~~

~~*(b)* the relative expense and burden on each side of producing it;~~

~~*(c)* the relative benefit to the parties of producing it; and~~

~~*(d)* whether the responding party has any special or customized system for storing or retrieving the information.~~

iv.~~v.~~ The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.

30. **Using Technology to Facilitate Discovery.**

a. **In appropriate cases, the parties may agree or the court may direct that some or all discovery materials that have not been stored in electronic form should nonetheless be produced, at least in the first instance, in an electronic format and how the expenses of doing so will be allocated among the parties.**

b. **~~Upon request, a~~A party serving written discovery requests or responses should provide the other party or parties with ~~a diskette or other~~ an electronic version of the requests or responses unless the parties have previously agreed that no electronic version is required.**

31. Discovery Conferences.

a. At the initial discovery conference, the parties should confer about any electronic discovery that they anticipate requesting from one another, including:

i. The subject matter of such discovery.

ii. The time period with respect to which such discovery may be sought.

iii. Identification or description of the party-affiliated persons, entities or groups from whom such discovery may be sought.

iv. Identification or description of those persons currently or formerly affiliated with the prospective responding party who are knowledgeable of the information systems, technology and software necessary to access potentially responsive data.

v. The potentially responsive data that exist, including the platforms on which, and places where, such data may be found, including:

a. Databases;

b. Networks;

c. Computer systems, including legacy systems;

d. Servers;

e. Archives;

f. Back up or disaster recovery systems;

g. Tapes, discs, drives, cartridges and other storage media;

h. Laptops;

i. Personal computers;

j. Internet data; andk. Personal digital assistants.

vi. The accessibility of the potentially responsive data, including discussion of software that may be necessary to obtain access.

vii. Whether potentially responsive data exist in searchable form.

viii. Whether potentially responsive electronic data will be requested and produced in electronic form or in hard copy.

ix. Data retention policies applicable to potentially responsive data.

x. Preservation of potentially responsive data, specifically addressing preservation of data generated subsequent to the filing of the claim.

xi. The use of key terms or other selection criteria to search potentially responsive data for discoverable information, in lieu of production.

xii. The identity of unaffiliated information technology consultants whom the litigants agree are capable of independently extracting, searching or otherwise exploiting potentially responsive data.

xiii. Stipulating to the entry of a court order providing that production to other parties, or review by a mutually-agreed independent information technology consultant, of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection.

b. At any discovery conference that concerns particular requests for electronic discovery, in addition to conferring about the topics set forth in subsection (a), the parties should consider stipulating to the entry of a court order providing for:

i. The initial production of tranches or subsets of potentially responsive data to allow the parties to evaluate the likely benefit of production of additional data, without prejudice to the requesting party's right to insist later on more complete production.

ii. The use of specified key terms or other selection criteria to search some or all of the potentially responsive data for discoverable information, in lieu of production.

iii. The appointment of a mutually-agreed, independent information technology consultant pursuant to Standard 32(a) to:

A. Extract defined categories of potentially responsive data from specified sources, or

B. Search or otherwise exploit potentially responsive data in accordance with specific, mutually-agreed parameters.

32. Attorney-Client Privilege and Attorney Work Product. To ameliorate attorney-client privilege and work product concerns attendant to the production of electronic data, the parties should consider stipulating to the entry of a court order:

a. Appointing a mutually-agreed, independent information technology consultant as a special master, referee, or other officer or agent of the court such that extraction and review of privileged or otherwise protected electronic data will not effect a waiver of privilege or other legal protection attaching to the data.

b. Providing that production to other parties of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection attaching to the data.

c. Providing that extraction and review by a mutually-agreed independent information technology consultant of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection attaching to the data.

d. Setting forth a procedure for the review of the potentially responsive data extracted under subdivision (a), (b), or (c). The order should specify that adherence to the procedure precludes any waiver of privilege or work product protection attaching to the data. The order may contemplate, at the producing party's option:

i. Initial review by the producing party for attorney-client privilege or attorney work product protection, with production of the unprivileged and unprotected data to follow, accompanied with a privilege log, or

ii. Initial review by the requesting party, followed by:

A. Production to the producing party of all data deemed relevant by the requesting party, followed by

B. A review by the producing party for attorney-client privilege or attorney work product protection.

The court's order should contemplate resort to the court for resolution of disputes concerning the privileged or protected nature of particular electronic data.

e. Prior to receiving any data, any mutually-agreed independent information technology consultant should be required provide the court and the parties with an affidavit confirming that the consultant

will keep no copy of any data provided to it and will not disclose any data provided other than pursuant to the court's order or parties' agreement. At the conclusion of its engagement, the consultant should be required confirm under oath that it has acted, and will continue to act, in accordance with its initial affidavit.

f. If the initial review is conducted by the requesting party in accordance with subsection (d)(ii), the requesting party should provide the court and the producing party an affidavit stating that the requesting party will keep no copy of data deemed by the producing party to be privileged or work product, subject to final resolution of any dispute by the court, and will not use or reveal the substance of any such data unless permitted to do so by the court.

33. Technological Advances. To the extent that information may be contained or stored in a data compilation in a form other than electronic or paper, it is intended that Standards 29-32 may be consulted with respect to discovery of such information, with appropriate modifications for the difference in storage medium.